

EXHIBIT 28

US District Court - Delaware
Chapter 11 - W.R. Grace

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

CHAPTER 11

IN RE:

W.R. GRACE & CO., et al.,

Debtors.

Case No. 01-1139 (JFK)

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DEPOSITION OF:

Dr. Thomas Florence

Tuesday, October 30, 2007

Washington, D.C.

Lead: Nathan Finch, Esquire

Firm: Caplin & Drysdale Chartered

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1 are provided to us by the client.

2 **Q And in those cases you are not**
3 **providing your expert opinion as to what**
4 **the liability they face in the tort system**
5 **would be. But you are applying your**
6 **opinion as to what their liability would be**
7 **using the assumptions they gave you,**
8 **correct?**

9 MR. LEIBENSTEIN: Objection.

10 It mischaracterizes the testimony.

11 A We are normally giving an
12 opinion of what the liability would be,
13 either the liability -- of what are the
14 dollar terms or claim terms under the
15 assumptions that were provided to us.

16 **Q Have you ever testified --**
17 **strike that.**

18 **Why do you look -- why do you**
19 **rely on the company's historical experience**
20 **in the tort system for making an estimate**
21 **of what its liability would be in the tort**
22 **system?**

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1 **Q** Did you agree or disagree with
2 any of the critique that Professor Stallard
3 made of your work?

4 MR. LEIBENSTEIN: The answer to
5 that has to be yes.

6 **Q** Did you disagree with any of
7 the critiques that Professor Stallard made
8 of your work?

9 A Generally, I disagreed with the
10 critique.

11 **Q** All right. We will take and
12 review that in more detail in a minute.

13 Is it correct that, in your
14 analysis for this case, for the purposes of
15 the pending unresolved claims, you assumed
16 that, unless there was evidence submitted
17 by the claimant in response to the
18 questionnaire process that demonstrated
19 that the claim met Grace's criteria, that
20 the claim would be invalid?

21 A No.

22 **Q** What assumption did you make in

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1 **that regard?**

2 A Well, generally, we calculated
3 these criteria two ways. One was the
4 estimate of the number of pending claims
5 that met the criteria as a function of the
6 number that filed the POC.

7 And then we estimated the
8 number of claims that met the criteria of
9 the ones that provided sufficient
10 information to judge the criteria. And we
11 then applied that rate to the claims that
12 filed the POC.

13 So we assumed that, where there
14 was sufficient information to make a
15 judgment, that the rate at which people met
16 these criteria would apply to all people
17 that filed the POC.

18 **Q So turning to page eight in**
19 **your September report, the universe of**
20 **claims, pending claims that you are using**
21 **for your estimates, is 73,348 pending**
22 **claims; is that right?**

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1 met the criteria.

2 And I think what table 4-12

3 does is kind of shows that, illustrates the

4 average, and those with insufficient

5 information, those did not meet, and those

6 that met.

7 **Q Okay. But the values you use**
8 **in your forecast are based on the six that**
9 **met the criteria, correct?**

10 A Right, with the understanding
11 that the criteria didn't seem to be what
12 was driving the value. We saw no
13 significant difference between these --
14 statistically significant difference, other
15 than there was an upward trend.

16 **Q But it wasn't a statistically**
17 **significant trend, correct?**

18 A Correct.

19 **Q All right. You reviewed -- or**
20 **who did the closed claim review?**

21 A I'm sorry. What?

22 **Q Who had reviewed the sample --**

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1 **discovery of information to which it would**
2 **otherwise have had access."**

3 **Do you see that, Dr. Florence?**

4 MR. LEIBENSTEIN: I want to
5 object to the extent you read it
6 wrong.

7 MR. FINCH: It is what it is.

8 **Q Does that in any way influence**
9 **your view as to whether or not the**
10 **information submitted pursuant to the**
11 **questionnaires is reliable for purposes of**
12 **estimates of whether or not claimants could**
13 **meet Grace's assumed exposure and medical**
14 **criteria?**

15 A No.

16 **Q Why not?**

17 A Well, presumably, there is, for
18 example, when you look at the medical
19 information, the medical information is
20 likely to -- at least from what we have
21 seen, there is a substantial lag between
22 the time a case is diagnosed and the tests

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1 are done, until the time that the case is
2 filed.

3 So I would assume that there is
4 not much development of medical information
5 during that period, which doesn't say that
6 there wouldn't be, or couldn't possibly be.

7 But I can't imagine that you
8 have substantial changes in the medical
9 information.

10 **Q Well, let's stop right there.**

11 MR. LEIBENSTEIN: Let him
12 finish his answer.

13 MR. FINCH: Okay.

14 A In terms of exposure
15 information, as I understand it, the
16 issues, the questions -- the questions on
17 the questionnaire and the PIQ basically ask
18 for occupation and industry, and time
19 period of when exposed.

20 And it seems to me that is kind
21 of a work history. So I'm not sure. I
22 guess it's possible that a work history

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1 wasn't taken of a person initially; but
2 given that if it's available, if there is a
3 work history available, it seems like that
4 is -- the work history is a work history.
5 So --

6 **Q Do you have any --**
7 MR. LEIBENSTEIN: Wait.

8 A I am having trouble
9 understanding the impact of this on the
10 information.

11 **Q Okay. Do you have any**
12 **understanding as to whether the work**
13 **history provided by the claimant is all of**
14 **the information that is available as to**
15 **whether or not he was exposed to Grace's**
16 **asbestos-containing products at a**
17 **particular place or a particular time, or**
18 **are there sources of information beyond the**
19 **claimant's work history that are relevant**
20 **to that topic?**

21 MR. LEIBENSTEIN: Objection.
22 You were asking before about with

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1 switched to Dr. Nicholson with claims.

2 **Q Do you recall that**
3 **Dr. Nicholson used his methodology to**
4 **project claims in the Fiber Board class**
5 **action proceeding, Dr. Florence?**

6 A I wasn't involved in the Fiber
7 Board class action proceeding.

8 **Q The Nicholson approach for**
9 **projecting claims, could you describe that?**

10 A Sure. The Nicholson approach
11 looks at the -- based on employment records
12 and records about average exposures in
13 certain industries, estimates the size of
14 the exposed population to asbestos at
15 various dose levels, and over time, and
16 from that estimates the incidence of
17 mesothelioma that will arise as a result of
18 that exposure, using an epidemiological
19 method, such as the OSHA model.

20 **Q After enough time has elapsed,**
21 **you can compare -- the reason it's called a**
22 **Nicholson model is it began with the 1982**

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1 **paper by Nicholson, Perkel and Selikoff**
2 **which projected the future incidence of**
3 **mesothelioma in the United States of**
4 **America, correct?**

5 A That's correct. I think it was
6 first published --

7 Q First published in 1982 based
8 on projected mesothelioma incidence going
9 1980 into the future, correct?

10 A Correct.

11 Q And then after a sufficient
12 period of time is elapsed, you can compare
13 the actual data in terms of SEER estimates
14 of mesothelioma incidence in the
15 United States to the projections performed
16 by Nicholson and the other people at Mount
17 Sinai, correct?

18 MR. LEIBENSTEIN: Objection.
19 Vague.

20 A The question again?

21 (Reporter read back pending
22 question.)

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1 A You can. You can compare
2 incidence in the United States with his
3 forecasts.

4 **Q And the KPMG variant is**
5 **updating the Bureau of Labor statistics**
6 **information, using the same 1986 OSHA dose**
7 **response curves, to do an updated forecast**
8 **of mesothelioma incidence; is that correct?**

9 A That's correct.

10 **Q Okay. And that was work**
11 **performed by your partner or your colleague**
12 **or whatever he is, Tom Vasquez, in 1991?**

13 A That's correct.

14 **Q You rely on that 1991**
15 **variability of the Nicholson projected**
16 **incidence of mesothelioma for the purposes**
17 **of projecting asbestos claims against**
18 **asbestos defendants and trusts?**

19 MR. LEIBENSTEIN: Objection.
20 Mischaracterizes the record.

21 A We used the output of that
22 model as an indicant of the incidence of

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1 to object to the prefatory comments.

2 **Q You can answer the question.**

3 MR. LEIBENSTEIN: Although I
4 have no reason to dispute how you
5 always thought about it.

6 A In general, the Pito model
7 looks at the claims of interest for a
8 defendant; and, in our case, in the Grace
9 case, it was the claims that met the
10 criteria.

11 And it says how big does the
12 population have to be of exposed parties to
13 generate this group of claims.

14 **Q Okay.**

15 A Using -- under the assumption
16 that the OSHA models are correct.

17 **Q Okay. So what you do is you**
18 **take the claims that arise from**
19 **mesothelioma and lung cancer in the**
20 **calibration period and run them through the**
21 **dose response models to estimate the size**
22 **of the exposed population which could lead**

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1 **to that number of claims in the calibration**
2 **period; is that correct?**

3 MR. LEIBENSTEIN: As a general
4 matter.

5 A Correct, as -- generally,
6 that's right.

7 Q Okay. And then you take the
8 **assumed exposed population and age it**
9 **forward year by year, correct?**

10 A You take that assumed
11 population, and estimate by, again, the
12 OSHA models the number of cases that would
13 result out of that population of
14 mesothelioma and lung cancer, and the
15 number of people that would die of other
16 cases, and for each year. So that
17 population diminishes as it goes forward.

18 Q So there is an assumed exposed
19 **population, and then you roll that**
20 **population forward using the OSHA -- 1986**
21 **OSHA dose response equations to predict how**
22 **many of that population will die of**

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1 **how would you have estimated Grace's**
2 **liability?**

3 MR. LEIBENSTEIN: Objection.
4 Incomplete hypothetical.

5 **Q You may answer.**

6 A Well, it's probably a function
7 of what the situation was, I guess. Maybe
8 if you can be more specific.

9 **Q Well, in 2003, if Grace had**
10 **come to you and said, "Dr. Florence, please**
11 **estimate the amount of our asbestos**
12 **liability," how would you have done it?**

13 MR. LEIBENSTEIN: Objection.
14 It doesn't answer the witness's
15 question.

16 A I would have asked them under
17 what assumptions. That's a question that I
18 routinely would ask the client.

19 **Q If the answer for Grace at that**
20 **time was, "Under the assumption that the**
21 **bankruptcy court will want to know what our**
22 **asbestos liability would be if we had**

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1 bankruptcy. And since I'm not sure what
2 "disallowance" in bankruptcy is, my
3 estimate -- I don't -- it doesn't allow for
4 disallowance claims in bankruptcy. Or it
5 if it does, I don't know it.

6 **Q That's fair enough. You have,**
7 **however, excluded certain claims from the**
8 **base from which you provide your forecast.**
9 **We talked about that this morning, namely**
10 **claims that don't meet the criteria.**

11 A Right.

12 **Q Okay. Does the -- I will use**
13 **the word "exclusion" --**

14 A Not completely claims that
15 don't meet the criteria. I mean, some
16 claims, we assume, will meet the criteria.
17 I mean, there are -- the two, what we
18 talked about this morning, these kind of
19 two estimates, so there is kind of this --
20 there is the one estimate, the high end
21 estimate, which says that we are making an
22 assumption that they will meet the

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1 criteria, even though there is no
2 information that has been provided that
3 would allow us to make that assessment.

4 **Q Now, the exposure criteria that**
5 **you used or were asked to use, would you**
6 **agree that those criteria reject claimants**
7 **who responded that they personally removed**
8 **or cut asbestos-containing -- Grace**
9 **asbestos-containing products?**

10 MR. LEIBENSTEIN: Objection.

11 Mischaracterizes the report.

12 **Q I will show you an exhibit that**
13 **will put this in context. Exhibit 14,**
14 **Dr. Florence, if you could turn to page 11**
15 **of Exhibit 14.**

16 A What is the Bates number on
17 that?

18 **Q It would be 2-200018, part**
19 **five, exposure to non-Grace -- no,**
20 **actually, let me go back one page, page**
21 **nine, Bates dash 16, part three, "direct**
22 **exposure to Grace asbestos-containing**

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1 **Q Correct. Now, you agree that**
2 **the proof of claim hurdle does not exist**
3 **for the resolution of open cases in the**
4 **tort system with solvent defendants?**

5 MR. PASQUALE: Objection to the
6 form.

7 A Not completely. I don't agree
8 with that.

9 **Q Is proof of claim screen --**

10 MR. LEIBENSTEIN: Wait.

11 **Q I am sorry. I thought he was**
12 **done.**

13 A The importance of the proof of
14 claim criteria is, as I understand, the
15 court basically said: "You file the proof
16 of claim or you don't get paid."

17 There is a certain portion of
18 claims, at least in my experience, that are
19 filed, with all defendants, that are either
20 withdrawn or not prosecuted.

21 So the importance of the proof
22 of claim criteria is, at least from where I

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1 stand, is we were trying to start with a
2 base of claims that are claims that would
3 be filed, not withdrawn and prosecuted, in
4 other words, claims that would come
5 forward, meet these criteria, and one of
6 the criteria being it was a claim that
7 would be pursued, so in that sense.

8 **Q I think you may have been asked**
9 **this this morning. If you were, I**
10 **apologize for repeating the question:**

11 **Does a proof of claim**
12 **requirement exist for future claimants?**

13 **MR. LEIBENSTEIN: Objection.**

14 **Asked and answered.**

15 **A Not strictly a proof of claim**
16 **requirement. A proof of claim requirement**
17 **in the sense that I'm speaking of it, that**
18 **it's -- it's based on -- since the future**
19 **is based on these pending claims and per**
20 **the current claims, I am only forecasting**
21 **those claims that would be not withdrawn,**
22 **and pursued, prosecuted.**

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1 **know?**

2 A As far as I know, it's not in
3 the report, no.

4 **Q Are you aware of any asbestos**
5 **personal injury claim that W.R. Grace**
6 **settled prepetition under the specified**
7 **assumptions or specified criteria, or, in**
8 **other words, using the specified criteria**
9 **as a prerequisite to payment settlement?**

10 A I really haven't done that
11 analysis.

12 **Q But you have looked -- in**
13 **computing the average settlement amounts,**
14 **you have looked at six mesothelioma claims**
15 **that met the criteria, correct?**

16 A Correct.

17 **Q And you have used those six**
18 **claims to make further forecasts, correct?**

19 A You are talking about table
20 4-12?

21 **Q Yes.**

22 A We certainly used those six to

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1 estimate what the value was of the people
2 that met the criteria.

3 And, you know, when we were
4 faced with trying to value these claims and
5 trying to determine what a reasonable value
6 of the claims were, we were faced with
7 which of these values in this table are
8 representative or reasonably representative
9 of what the claim would be paid, either --
10 both today and then inflated in the future.

11 And I think we said -- here, we
12 actually tested to see if there was any
13 statistical significance in the difference
14 between these values.

15 And one approach would have
16 been to assign the overall average of the
17 \$96,000, which probably, given there was no
18 statistically -- is no statistically
19 significant difference between these, would
20 have been a reasonable approach.

21 We took the "med" criteria
22 dollar amount only because we had some data

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1 on how many claims met that criteria. And
2 there seemed to be some monotonic
3 relationship between the criteria and how
4 closely you can -- came to meeting the
5 criteria and value.

6 But there was -- there was --
7 there was little to suggest historically
8 that these criteria made much difference in
9 the value in the claim.

10 I mean, again, we are looking
11 at this. It seems to -- there is a kind of
12 a natural progression depending upon
13 whether you have not enough information or
14 you didn't -- did not meet the criteria,
15 whether you met the criteria.

16 But, you know, statistically,
17 there is really no difference in these.

18 So Mr. Finch was asking me
19 questions about this, and, yes, there are
20 six claims that met the criteria. But it
21 would have been just as reasonable to take
22 the overall average, as the 155,000. I

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1 don't think there was anything -- anything
2 magic about the 155,000 that was selected,
3 at least from our analysis of the historic
4 claims.

5 **Q Do you have an opinion**
6 **whether -- if the six mesothelioma claims**
7 **in your forecast were settled under the**
8 **specified assumption as criteria for**
9 **settlement, whether the settlement amounts**
10 **would have been different?**

11 **A** I have no way of knowing. I
12 would say I think, probably. Maybe the way
13 to answer that is it didn't seem to make
14 any difference whether -- statistically,
15 whether the criteria were met or not met
16 with regard to settlement value.

17 So it probably wouldn't have
18 made a difference. I mean, it probably
19 wouldn't have made a difference.

20 **Q And you have assumed, for**
21 **purposes of valuing future claims, that**
22 **there would be no difference in the average**

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1 **settlement value, correct?**

2 MR. LEIBENSTEIN: Objection. I

3 don't know what the "no difference"

4 refers to.

5 **Q There would be no difference --**

6 **you have assumed for purposes of valuing**

7 **future claims that the average settlement**

8 **value for the six mesothelioma claims in**

9 **your sample would have been no different**

10 **had Grace settled those cases using the**

11 **specified assumptions as prerequisite**

12 **criteria?**

13 A And what I am really saying is

14 that, had Grace settled those cases with

15 the requisite criteria, there is probably

16 no reason to assume that the average of

17 those cases, whether they be 6 or 100,

18 would differ from the overall average of

19 \$96,000.

20 **Q There is no reason to assume**

21 **that a claimant who could demonstrate that**

22 **he personally mixed or personally installed**

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